In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 503

FREDERICK FRANCIS ZIEBER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 24, 1946, petitioner, a Jehovah's Witness, was convicted and sentenced to imprisonment for three years in the United States District Court for the Eastern District of Pennsylvania for having failed to report for work of national importance, as directed by his local board, in violation of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. 311) (R. 1, 264). At his trial, the material contents of petitioner's selective service file were received in evidence (see R. 201–263), and the jury was instructed that the selective service classification was final, unless it was arbitrarily made, and

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extensive instructions were given concerning the proceedings before the local board (R. 155–178). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the judgment was reversed (R. 271). The court held that the jury had been incorrectly instructed concerning a me ting which petitioner had with the local board on August 27, 1945, and that a new trial should be had in which the controverted issue of procedural due process could be fully explored and submitted to the jury under correct instructions (R. 266–271).

Petitioner's basic contention in this Court is that the court below should have ordered the indictment dismissed on the ground that his classification was illegal, instead of remanding the cause for a new trial. But as Judge Biggs, speaking for the Third Circuit, points out, the determination of the question whether petitioner was deprived of procedural due process depends on the resolution of controverted issues of fact, and this is appropriately the function of the jury. In this respect, the case is unlike *Cox* v. *United States,* No. 66–68, decided November 24, 1947, where this Court held that the question whether there is any evidence in the administrative record to support the selective service classification is a question of law for the court. In this case it is necessary to go outside the administrative record and receive testimony concerning the circumstances of the August 27, 1945, hearing. Reso-

lution of the controverted factual question is appropriately one for the jury under proper instructions. See Mr. Justice Frankfurter, concurring in *Estep* v. *United States*, 327 U. S. 114, 145. Accordingly, we think that, assuming the defense was open to petitioner, the court below properly remanded the case for a new trial.

We have a more fundamental difficulty with this case than any which petitioner urges. The court below held (R. 267–268) and petitioner insists (Pet. 22–23) that he did not take an appeal from the local board to the board of appeal. Assuming, *arguendo*, that all the procedural defects which petitioner urges did occur before the local board, they could have been corrected by an administrative appeal. Thus, for example, if petitioner had availed himself of his appellate remedy in the administrative process he would have been permitted to submit to the board of appeal "a statement specifying the respects in which he believes the local board erred;" he would have been permitted to direct attention to any information in the selective service file which he believed the local board failed to consider or give sufficient weight; and he could have submitted to the board of appeal "any information which was offered to the local board and which the local board failed or refused to include in the registrant's file." Selective Service Regulation 627.12, 6 F. R. 6845. In short, petitioner could have

availed himself of a well known administrative remedy and he failed to do so. Indeed, in his argument in this Court, as in the courts below, he insists that he did not appeal. In these circumstances, it is plain that he failed to exhaust his administrative remedies and is not entitled to defend on the ground of illegal classification. *Falbo* v. *United States,* 320 U. S. 549. The decision of the court below was consequently more favorable to petitioner than the law requires.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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